Supreme Court, U.S.
FILED
SEP 21 1995
CLERK

No. 95-223

In The

Supreme Court of the United States

October Term, 1995

CINCINNATI INSURANCE COMPANY,

Petitioner,

v.

ORANGEBURG SAUSAGE COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The South Carolina Court Of Appeals

REPLY BRIEF OF PETITIONER

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REPLY

I. RESPONDENT IS SIMPLY WRONG IN ASSERTING THAT PETITIONER DID NOT PRESERVE IN THE SOUTH CAROLINA COURTS THE ISSUES THAT IT HAS BROUGHT TO THIS COURT.

Petitioner has appealed to this Court on the grounds, *inter alia*, that the South Carolina Court of Appeals erred in holding that the award of punitive damages in this case met the requirements of due process. Respondent's Brief in Opposition states that Cincinnati waived its right to appeal on this issue by failing to present it to the State courts. OSCO's assertion is not truthful. As early as Cincinnati's Answer, the unconstitutionality of any punitive damages award was asserted. R. at 59. At oral argument before the South Carolina Court of Appeals, counsel for OSCO admitted to that court that *throughout the trial* Cincinnati had raised the constitutionality issue regarding the punitive damages. He responded, in pertinent part, to Judge Goolsby's question:

> Judge Goolsby: Was [the issue of the constitutionality of South Carolina appellate review of punitive damages] ever raised to the trial judge?
>
> Mr. Suggs: Throughout the trial the defendants kept saying "we want to preserve our constitutional objections on punitive damages."
>
> * * *
>
> They kept saying "we want to preserve all our constitutional objections to punitive damages. . . . "

Tape, oral argument, South Carolina Court of Appeals, October 4, 1993.

Cincinnati has, in appealing to this Court, cited five different ways in which the punitive damage award in

this case constituted a deprivation of its rights to due process. They are designated as (a) through (e) of the Questions Presented in the Petition for a Writ of Certiorari. Each of them was presented to the courts of South Carolina.

Cincinnati's first point is that the trial court allowed punitive damages based on evidence relevant only to the unelected cause of action for bad faith. OSCO's counsel, in argument before the South Carolina Court of Appeals, admitted that, despite OSCO's election of the negligence cause of action, the trial court allowed the evidence of bad faith to go to the jury in the punitive damages phase. The colloquy between OSCO and the court was:

> Judge Cureton: My concern is whether or not all the damages relate to the negligence, and the negligent procurement. Especially on the punitive damages, there was a lot of testimony about the conduct of Cincinnati after the damage occurred. Could not a jury have awarded a lot of these punitives, a bulk of them, based on the conduct that occurred after the fact here?
>
> Mr. Suggs: The judge, in fact, sent the punitive damages to the jury based on all the conduct of Cincinnati Insurance Company and the agent. In other words, and there's a colloquy in the record before the punitive damages phase, where the judge indicated that just because we had elected to have *judgment* entered on the negligence cause, that didn't wipe out the *conduct* on the

bad faith cause (emphasis added).

Judge Cureton: Is that proper?

Mr. Suggs: I believe it is, your Honor.

Judge Goolsby: Was that issue raised?

Mr. Suggs: Well, then there was a colloquy about whether to do that or not. The judge said, well I'm gonna submit all the conduct to the jury on punitive damages.

* * *

Judge Goolsby: He was never requested to tell the jury to disregard all evidence relating to the claim on bad faith?

Mr. Suggs: He was requested before the charge to do that. . . . That issue was in the air before the jury charge.

Tape, oral argument, South Carolina Court of Appeals, October 4, 1993. This issue was, as Plaintiff's counsel admitted, presented to the trial court prior to the charge on punitive damages. R. at 955-960. This issue was also brought up in Cincinnati's post-trial motions, which the trial court permitted to be filed within ten days after the trial. R. at 68, 122. The trial court's Order Regarding Post-Trial Motions considered these motions, R. at 6, and denied them. Cincinnati cited this issue in its motion under Rule 59(e) to reconsider the judgment. R. at 160. Cincinnati thereafter cited and discussed this issue in its brief on appeal to the South Carolina appellate courts, Brief of Appellant at 39, and in its reply brief. Reply Brief of Appellant at 1-8. Cincinnati similarly put forth this issue in its petition to the South Carolina Supreme Court. Petition for Writ of Certiorari at 24-28. This issue has been consistently raised in the courts of South Carolina, OSCO's brief to the contrary notwithstanding.

Cincinnati's second objection that the process below deprived it of due process as regards the punitive damage award focuses on the amount of financial information presented about Cincinnati and the method of presentation. At trial, Cincinnati strongly objected to the introduction of this evidence before, during, and after its presentation. R. at 949-50, 953, 964-66. Cincinnati continued to recite its objections to the "wealth" evidence in its post-trial motions. R. at 78-9, 83, 90, 132. Cincinnati also pursued this issue in its appeal through the South Carolina appellate courts. Brief of Appellant at 29; Petition for Writ of Certiorari at 37, 43-44. This issue is clearly alive and well before this Court.

Cincinnati's third point of appeal to this Court is that Cincinnati is deprived of its due process rights by being targeted exclusively for punitive damages – because it was the deep-pocket, out-of-state corporation – by excusing the local agent from any liability for such damages even though he was stipulated to be the sole actual tortfeasor. Cincinnati objected to this invidious focusing at trial. R. at 950-51, 954-55. Such focusing generally was cited in Cincinnati's post-trial motions. R. at 132. It was put forth by Cincinnati in its appeal. Brief of Appellant at 26.

The fourth deficiency in due process regarding the punitive damage award stated by Cincinnati is that there was no evidence of recklessness or knowingly wrongful conduct by Cincinnati. This issue was also set forth in the trial court. R. at 939-40. An objection was made to any punitive damages hearing on this basis. R. at 950. The issue was stated again in Cincinnati's post-trial motions. R. at 79, 131-32, 135-36. Cincinnati maintained its pursuit of the issue to the State appellate courts. Brief of Appellant at 23, 26; Reply Brief of Appellant at 13-14. Cincinnati also put forth the issue in seeking review from the State Supreme Court. Petition for Certiorari at 30-32.

The fifth deficiency in due process that Cincinnati cites to this Court is that the South Carolina scheme for review of punitive damage awards does not meet the standards for due process established by this Court in

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991). Though this issue was perhaps not ripe for adjudication until the South Carolina Supreme Court had addressed this case, in an abundance of caution Cincinnati put forth the issue in its post-trial motions. R. at 63, 87-91. Cincinnati brought the issue to the attention of the appellate courts of South Carolina. Brief of Appellant at 27-28 (arguing, not generally, but specifically, that the South Carolina procedure for review of punitive damage awards did not comply with *Haslip*); Petition for a Writ of Certiorari at 35-40 (arguing specifically that the South Carolina scheme of punitive damages review, as set forth in *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991), was unconstitutional because it failed to comply with *Haslip*). When the issue was fully ripe for adjudication, i.e., when the South Carolina Supreme Court denied certiorari, Cincinnati presented it to this Court with a prayer for review.

The second major point that Cincinnati has presented in its Petition for Certiorari to this Court is that it was denied due process because the jury's verdict was the result of passion, caprice, and prejudice. That was presented to the trial court, R. at 940-41, and in the post-trial motions. R. at 62, 93-96. The issue of the influence of passion, caprice, and prejudice on the jury's verdict was also presented to the appellate courts. Brief of Appellant at 31-35; Reply Brief of Appellant at 15-17; Petition for Certiorari at 41-44.

It is ironic that OSCO would rely on excerpts from an unpublished and uncertified tape of the oral argument before the South Carolina Court of Appeals to stand for the proposition that Cincinnati somehow orally waived its arguments about the constitutionality of the punitive damage award when that tape as cited above clearly demonstrates OSCO's own acknowledgement that these were issues from the beginning that were "consistently" asserted by Petitioner. The one edited excerpt OSCO seeks to advance out of context concerns only an effort by counsel to redirect the attention of one of the justices to another matter which should have resulted in a reversal

of the entire verdict, and was done in the limited time restraints imposed on oral argument. At the time, no one – the court members nor any counsel – would have characterized this as a waiver. This is evidenced by Plaintiff's counsel's admissions and the further questioning of the court on this issue, all of which took place *after* OSCO now disingenuously says that a waiver took place. Indeed, the excerpts from the tape submitted above were also well after Plaintiff's edited excerpts. Further, the Court of Appeals decision itself clearly reflects that no oral waiver was made.

Based on Cincinnati's timely presentation of all its issues to the trial court, and its consistent reiteration of them to the appellate courts, these issues are preserved for review by this Court.

II. OSCO CONCEDES THAT THERE WAS NO MEANINGFUL APPELLATE REVIEW OF THE PUNITIVE DAMAGES AWARD, WHICH IS REQUIRED BY *HASLIP* TO MEET THE REQUIREMENTS OF DUE PROCESS.

OSCO in no way defends the thoroughness, acuity or objectivity – or any other quality that would make a review meaningful – of the review conducted by the South Carolina Court of Appeals. Since it tacitly recognizes that the court of appeals' review was not meaningful, OSCO has adopted the view that due process does not require appellate review.

The fact is that the review of punitive damages which was employed in this case was far less objective and rigorous than the procedure for review applied in *Haslip*. In that case, meaningful reviews were conducted at both the trial court and appellate court levels. This Court emphasized the availability and importance of the appellate review. It said:

> By its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion. It first

> undertakes a comparative analysis. [citation omitted]. It then applies the detailed substantive standards it has developed for evaluating punitive awards. In particular, it makes its review to ensure that the award does "not exceed an amount that will accomplish society's goals of punishment and deterrence." [citations omitted]. *This appellate review makes certain that punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.*

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. at 21 (emphasis added) (citations and footnote omitted).

The review in the case at hand was dramatically deficient when evaluated by the standards of *Haslip*. The limited appellate court review in this case focused heavily on the idea that the trial court had found the punitive damages to be "within reasonable limits," App. at 24, i.e., that it was "within proportions to the original actual award" and "easily within Cincinnati's ability to pay as it was only three/one-thousandths of Cincinnati's net worth." App. at 23.

In contrast to what the *Haslip* opinion observed about Alabama plaintiffs, 499 U.S. at 22, South Carolina plaintiffs do enjoy a windfall if they have a defendant with a deep pocket. The lack of any meaningful appellate review to act as a restraint on the jury's discretion deprives deep pocket defendants, especially from out of state, of due process. The "home-cooked justice" administered to Cincinnati here is an abject example of the pitfalls inherent in the South Carolina system.

III. OSCO'S ELECTION PRECLUDES AN AWARD OF PUNITIVE DAMAGES FOR BAD FAITH.

The very first sentence of OSCO's Statement of the Case in its Brief in Opposition states that "[t]his case arises out of Cincinnati Insurance Company's negligence and its bad faith failure to pay an insurance claim." This

statement is false. The cause of action elected was solely for negligence by the independent agent in procuring a policy of insurance. That cause of action made no mention of bad faith claims handling by adjusters. The statement only mocks the truth in that it is accurate to say that the damages awarded were actual damages for negligent procurement of the policy (the elected cause of action) and punitive damages for the unelected bad faith cause of action.

The differences in these causes of action are clearly identified in OSCO's Complaint. OSCO denies the importance of this by spuriously arguing that the Complaint did not go to the jury, as if to imply that since the jury did not physically possess the Complaint during its deliberations that OSCO must somehow not be bound by the Complaint's allegations. Respondent's Brief in Opposition at 19. Whether the Complaint went to the jury or not is absolutely irrelevant. The Complaint states the "charges" against the Defendant. When such charges seek punitive damages, they can be considered at least "quasi-criminal." *Smith v. Wade,* 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) cited in *Haslip,* 111 S.Ct. at 1044.

The allegations of OSCO's Complaint make it clear that the cause of action for negligence and the cause of action for breach of contract and the accompanying bad faith are mutually exclusive of one another. The unelected breach of contract action was for Cincinnati Insurance Company's failure to pay OSCO's alleged freezer damages under the existing policy. The bad faith cause of action was stipulated by OSCO's counsel to be for Cincinnati Insurance Company's bad faith refusal to pay under the policy and was further stipulated to be derivative of the breach of contract action. R. at 925. All counsel and the trial court understood that the unelected bad faith cause of action required a finding of liability under the unelected breach of contract action.

The elected negligence cause of action was stipulated to be for independent agent Bryant's failure to obtain the policy OSCO says it wanted. It was further stipulated that

all acts of negligence under this theory were those of the agent and not of Cincinnati Insurance Company. R. at 828.

The allegations of the Complaint are entirely consistent with the stipulations made by OSCO's counsel. Those stipulations were made at the close of evidence to define succinctly the various mutually exclusive theories of recovery. The only possible confusion about this arises because bad faith can be the result of negligence.[1] But, the unelected bad faith alleged and pursued and the negligence elected were entirely different causes of action. To allow actual damages for one and punitive damages for the other is utter nonsense and a gross abridgement of Defendant's due process rights.

IV. RESPONDENT'S ASSERTIONS TO THE CONTRARY NOTWITHSTANDING, THE TRIAL COURT'S ERROR IN ALLOWING THE JURY TO AWARD PUNITIVE DAMAGES BASED ON IRRELEVANT EVIDENCE DEPRIVED CINCINNATI OF ITS CONSTITUTIONAL RIGHTS.

The Constitution provides a fundamental guarantee that citizens "may rest secure against arbitrary or irrational deprivations of property." *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711, 2725 (1993) (Kennedy, J. concurring in part). If a party is deprived of property on the basis of irrelevant evidence, that deprivation is arbitrary. If evidence is not limited to that relevant to the allegations at issue, no rational line can be drawn between admissible evidence and that properly excludable. There would not be an adequate determining principle for the admission of evidence; by definition, that would be arbitrary.

Allowing evidence of bad faith – when that cause of action had not been elected when such election was

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[1] The South Carolina Court of Appeals was not confused, however, and simply held that the unelected allegations of bad faith could be considered in awarding punitive damages.

required and when such bad faith claims depended upon the existence of an enforceable contract which OSCO had denied – was to allow irrelevant evidence. In its brief in opposition OSCO cites *no* relevant evidence that would justify the award of punitive damages on its negligence claim. In the absence thereof, OSCO makes up from whole cloth the statement that Cincinnati "engaged in a series of acts to obfuscate, confuse and mislead the insured from discovering Cincinnati's negligence." Respondent's Brief in Opposition at 23-24. This assertion is inserted with no reference to the record or to any holding of the trial or appeals courts. There is no such evidence and no such holding. OSCO's attempt to create something that has no genesis in fact highlights the absolute lack of actual evidence of any recklessness or willfulness connected to the negligence cause of action.

CONCLUSION

This Court should grant Cincinnati's Petition for a Writ of Certiorari to address the important due process issues raised by the award of punitive damages in this case.

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